047

IN THE FLORIDA SUPREME COURT

4-28

IN RE: PETITION FOR
REINSTATEMENT OF
GARY E. SUSSER

Case # 81,402
TFB File # 93-00723-02-NRE

FILED
SID J. WHITE
APR 15 1994
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

****

PETITIONER'S BRIEF

GARY E. SUSSER, PRO SE
2755 S. Federal Hwy. Suite #13
Boynton Beach, FL 33435
407-735-4636
Attorney # 0622710

ORIGINAL

TABLE OF CONTENTS

TABLE OF CITATIONS..... ii

PRELIMINARY STATEMENT..... 1

STATEMENT OF THE CASE & FACTS..... 1

SUMMARY OF ARGUMENT..... 4

ARGUMENT

THE REFEREE'S RECOMMENDATION TO GRANT THE PETITION FOR REINSTATEMENT SHOULD BE FOLLOWED AND PETITIONER SHOULD BE REINSTATED TO THE PRACTICE OF LAW IN FLORIDA..... 6

CONCLUSION..... 12

CERTIFICATE OF SERVICE..... 13

TABLE OF CITATIONS

CASES CITED	PAGE NUMBER
In Re: Dawson 131 So. 2d 472(Fla.1961).....	10
In Re: Timson 301 So. 2d 448,449(Fla. 1974).....	7,10
The Florida Bar v. Eberhart, 19 F.L.W. S 88(2/1794).....	9
The Florida Bar re: Hipsh, 586 So. 2d 311(Fla. 1991).....	8,10
The Florida Bar v. Jahn 509 So. 2d 285(Fla. 1987).....	11
The Florida Bar v. Marcus 616 So. 2d 975(Fla. 1993).....	11
The Florida Bar re: Mattingly 342 So. 2d 508,510(Fla. 1977).....	10
The Florida Bar re: Sanders, 580 So. 2d. 154(Fla. 1991).....	6,7,8,9
The Florida Bar re: Sickmen, 523 So. 2d 154(Fla. 1988).....	7,8
The Florida Board of Bar Examiners re: R.L.V.H, 587 So. 2d 462(Fla. 1991).....	8
Florida Board of Bar Examiners re: Amendment to Rules of the Supreme Court Relating to Admissions to the Bar, 578 So. 2d 704(Fla. 1991).....	9
Petition of Wolf, 257 So. 2d 547,550(Fla. 1972).....	9
OTHER AUTHORITIES:	
Fla. Evidence Code Section 90.202(7).....	2
Rule 3.7-7(c)(5).....	4,11

PRELIMINARY STATEMENT

Petitioner hereby adopts the Preliminary Statement submitted by the Bar.

STATEMENT OF THE CASE & FACTS

Petitioner is a resident of Florida, not Ohio. Tr.19, 70,71. Petitioner was a member of the Ohio State Bar Association since 1979 and a member of The Bar since 1986. TR 82. Petitioner left Ohio in February, 1992 and moved to Florida, where he has since resided. TR 20,43

Petitioner was suspended from the practice of law in Florida for one year, nunc pro tunc May 23, 1989. This suspension, dated December 7, 1989, was a direct result of a December, 1988 felony drug abuse conviction in Ohio. TR 82,83. Petitioner was granted probation on this underlying criminal offense. TR 66.

Shortly before that December, 1988 felony conviction, petitioner's law office in Ohio was burglarized and he submitted a claim to his insurance carrier for the loss. The insurance carrier conspired with the deputy county sheriff, Brown, who had worked on the drug abuse case and petitioner was arrested on a seven count felony indictment on April 7, 1989. TR. 67

At trial in July, 1989, petitioner was found guilty on four felony counts. As a result of the four guilty verdicts, petitioner was found to be in violation of his probation. Upon appeal, all felony convictions have now been overturned, three for lack of any credible evidence, and one was reduced to a fourth degree misdemeanor.TR. 62,68,69. That misdemeanor conviction is still under appeal. TR 69.

As a result of the four original felony convictions, The Bar

filed additional charges against the petitioner. Petitioner requested the referee, on August 6, 1990, to delay any hearing until the first appeal had been decided. The referee, Judge Gary, denied petitioners motion and a hearing was conducted. In this second case, Supreme Court Case # 75,353, the referee originally suspended petitioner for three years, nunc pro tunc to November 14, 1992. This suspension was reduced by Judge Gary on remand, subsequent to three of the felony verdicts being overturned. TR 83. In the time between Judge Gary's last ruling and the evidentiary hearing on the petition for reinstatement, the fourth and final felony conviction was overturned and reduced to a fourth degree misdemeanor. That fourth degree misdemeanor remains under appeal as of this writing.

Judge Gary required that as a condition of petitioner's reinstatement to The Bar, he be required to retake all portions of the Florida Bar exam. In the summer of 1992, the petitioner took and passed all portions of the Florida Bar Exam and filed his petition for reinstatement in March, 1993. TR 84.

On April 7, 1993, the Ohio Supreme Court permanently disbarred the petitioner from the practice of law in that State. On April 4, 1994, a Motion to Vacate that ruling was filed in the Ohio Supreme Court. A copy of that Motion, complete with exhibits and affidavits, is attached hereto and incorporated herein as Exhibit "A". Petitioner requests that this Honorable Court take judicial notice of this pleading. Fla. Evidence Code Section 90.202(7).

Ohio is one of the few remaining states in which a permanent disbarment lasts forever without any hope of reinstatement. TR. 98. Should the above referenced Motion to Vacate fail, petitioner will be unable to ever return to the practice of law in the State of Ohio.

On September 22, 1993 Judge Gary conducted a hearing on the petition for reinstatement to the Bar. Judge Gary, after hearing the testimony and reviewing the evidence presented, found that the April 7, 1993 ruling of the Ohio Supreme Court was "harsh", rejected the Bar's Motion to Dismiss, and has recommended to this Honorable Court that the petitioner be reinstated to the practice of law in Florida.

This January 7, 1994 recommendation of Judge Gary favoring reinstatement was appealed by The Bar when it filed a Petition for Review on February 28, 1994.

SUMMARY OF THE ARGUMENT

In essence, the Bar is asking this Court to permanently suspend petitioner for a felony drug abuse and a fourth degree misdemeanor. In so doing, the Bar is asking this court to ignore the referee's Decision, as previously approved by the court, that petitioners offenses merited only a definite term suspension which ended on its own terms as of November, 1991.

This court's referee has now recommended petitioners reinstatement to membership in good standing to the Bar. The Bar is asking this court to ignore this recommendation. It is axiomatic that the Bar has the burden of proof in this matter. Rule 3-7.7(c)(5)

This court has never held that someone who has had the ability to return to practice forever closed in another State is unable to be reinstated to the practice of law in Florida. The Bar is now attempting to do something it has not been heretofore allowed to do, to immutably and permanently stop someone from ever being reinstated to the practice of law in the State of Florida. The Bar is demanding that this Court relinquish its discretion to ever reinstate a suspended lawyer.

The Bar has failed to meet its burden of showing that the referee's recommendations were erroneous, unlawful, or unjustified. Rule 3-7.7(c)(5).

The cases cited by The Bar are distinguishable in several aspects. In the case at bar the following differences are noted:

1) The referee has recommended that the petitioner be allowed to return to practice;

2) Petitioner had to retake and pass all portions of the Florida Bar Exam;

3) The Decision of permanent disbarment of the Ohio Supreme Court has been declared by the referee to be "harsh";

4) At the time of the Ohio decision, petitioner had been a Florida resident for over one year;

5) The Decision of the Ohio Supreme Court was predicated upon a fraud committed upon it; See attached Motion to Vacate.

ARGUMENT

Each and every case cited by the Bar in support of its position is distinguishable with the undisputed facts presented in these proceedings. The Bar has failed to meet its burden of proof that the referee's recommendation should not be followed.

The Bar cites to this court the case of The Florida Bar re Sanders, 580 So. 2d 594(Fla. 1991), where a New York attorney had been "disbarred" in that state. Sanders had applied for reinstatement three times in New York and had been denied each time. Sanders then applied for reinstatement to The Florida Bar, but Sanders did not have his civil rights restored at the time of his Florida petition for reinstatement. In New York, a "disbarment" is not permanent in the same sense it is used in Ohio, as Sanders could have been reinstated in New York once his "rehabilitation" had been completed.

The Florida referee in Sanders did not recommend reinstatement and this court denied the petition for reinstatement.

This court in Sanders, did agree that the discipline rendered in New York was a "valid consideration" in the reinstatement process, as was the three time denial of his New York petition for reinstatement. In the case at bar, this court's Referee, Judge Gary, duly noted that he had considered the Decision of the Ohio Supreme Court and determined it was a factor to be considered, but was not the sole controlling factor. Referee Judge Gary determined that the "State of Ohio has dealt harshly" with petitioner. Referee Report at P. #3.

The Bar has stated to this court that its referee, Judge Gary, erred in not considering the Ohio disbarment as a "critical factor" in determining reinstatement. The Bar's Brief at p. 5.

This semantical argument should be dismissed by this court. Judge Gary was well aware of the Bar's position and twice dismissed the Bar's Motion to dismiss the Petition for Reinstatement. The critical finding by Judge Gary was that "petitioner has complied with all requirements placed upon him by the Supreme Court of Florida, and has not only proved his rehabilitation, but has met every standard set forth in the case of In Re: Robert Duncan Timson 301 So. 2d 448(Fla. 1974)." Referee's Report at P. 3 & 4.

The Sanders court did not say that disbarment in a foreign jurisdiction is an absolute bar to reinstatement in Florida after being suspended here. This is the leap the Bar is now asking this court to make. The Bar asks this court to deprive itself of any discretion in cases such as the one at bar.

The Florida Bar re Sickmen, 523 So. 2d 154(Fla. 1988), cited by the Bar, is supportive of petitioners position for reinstatement and should be controlling. Sickmen received a three year suspension from the practice in Florida after being convicted of insurance fraud in New York. Subsequent to petitioning for reinstatement in Florida, the New York Bar, after years of proceedings, disbarred him for the same conduct as that which resulted in the Florida suspension. This Supreme Court rejected The Bar's argument that the New York disbarment precluded *reinstatement* in Florida with the following statement:

> Our previous judgment of suspension was a final adjudication of discipline regarding the misconduct in question, and the fact that another jurisdiction imposed a more severe sanction for the same misconduct does not justify our placing any greater burdens on the petitioner than those already imposed. Id., p.155.

In a separate concurring opinion, Justice Ehrlich noted:

"Mr. Sickmen has now done all that our Order of suspension required of him as a prerequisite to his reinstatement to

> the practice of law in this State, and I do not believe we have any alternative except to approve the referee's recommendation that he be reinstated, for the reasons set forth in the court's opinion, and thus we find ourselves in the position of permitting someone to practice law in Florida while he is disbarred from practice in a sister state." Id. at p. 156.

This Court has neither overruled nor receded from its decision in Sickmen. The Sanders decision does not replace Sickmen. The Sanders decision is unclear as to whether there was a separate evidentiary hearing in determining the Florida sanction to be imposed. It does appear that the sanction imposed resulted from the automatic felony suspension. In the case at bar, not only were there automatic suspensions, but subsequent to those sanctions, there were evidentiary hearings in which appropriate disciplinary orders were entered. As noted above, the second suspension was predicated upon felony suspensions that have all been reversed, leaving only a fourth degree misdemeanor still under appeal.

As was true with Mr. Sickmen, petitioner herein has complied with all requirements from the original disciplinary Orders. The Bar now asks this Court to add new , Draconian, requirements.

The Bar is arguing that the Ohio disbarment permanently precludes reinstatement in Florida. This argument was rejected by this court in The Florida Bar re Hipsch, 586 S. 2d 311(Fla. 1991). There, this honorable court ruled that even a permanently disbarred lawyer can petition this court for readmission to Florida. If a permanently disbarred lawyer in Florida is not precluded from seeking readmission, surely a lawyer that is suspended in Florida can not be forever precluded from seeking reinstatement.

The Florida Bd. of Bar Examiners re R.L.V.H., 587 So. 2d 462(Fla. 1991), cited by the Bar, is not applicable to these proceedings. R.L.V.H., having been permanently disbarred on Ohio, sought admission to The Florida Bar. His application for admission was denied. New requirements were not added to his

admission proceedings, as suggested by the Bar in this petition for reinstatement. In the case at bar, the petitioner has been a member of The Bar since 1986. R.L.V.H. was not a member of The Bar nor had he already been disciplined by the Supreme Court of Florida. Admission proceedings are far different than reinstatement proceedings after discipline has already been administered.

The 1991 rules change noted by The Bar in Florida Board of Bar Examiners re: Amendment to the Rules of the Supreme Court Relating to Admissions to the Bar, 578 So. 2d 704(Fla. 1991), pertains to the admission process in this State, not the reinstatement process. As such, it is inapplicable to the questions presented by The Bar in this case.

Finally, The Florida Bar v. Eberhart, 19 Fla. Law Week S 88 is cited by The Bar in support of its position for this court to deny respondents petition for reinstatement. However, Eberhart does not appear to be a case regarding a reinstatement petition. This court in Eberhart was presented with an original disciplinary action where the referee recommended that Eberhart be disbarred, with leave to reapply after he is reinstated to practice law in Connecticut. This court approved the referee's recommendation sanction of disbarment, citing the Sanders decision.

Disbarment is the worst of all calamities to most lawyers. Petition of Wolf, 257 So. 2d 547, 550(Fla. 1972) Petitioner submits that he has asked that the Ohio proceedings be reopened and he is hopeful that the Ohio order of permanent disbarment would be vacated. Petitioner asks this court to take judicial notice of the currently pending motion before the Ohio Supreme Court. Petitioner calls this courts attention to the affidavits of Terrence Seeberger, the assistant prosecuting attorney who also testified under cross examination by The Bar before this courts' referee.(TR 32 to 41). Seeberger contradicts

the testimony given at the Ohio hearing, supports the testimony of petitioner that he was not involved in the trafficking of drugs at any time, and attests that petitioner is fit to return to the practice of law, notwithstanding the Ohio decision. There is no one who had greater knowledge of the underlying drug abuse case than the assistant prosecutor Seeberger. His testimony before this court and now in an affadavit to the Ohio Supreme Court must be given their due weight.

Petitioner submits that because this Supreme Court had completed its "final adjudication of discipline" before the Ohio disbarment, there is no justification for the placement of greater burdens than those previously imposed by this Court.

Petitioner has retaken all portions of the Florida Bar Exam and passed same. He has meet his burden to demonstrate his fitness to resume the practice of law and has fulfilled all the conditions imposed upon him as one seeking reinstatement by this court. In re Dawson, 131 So. 2d 472(Fla. 1961); Timson, supra.

This Court has stated its view that an attorney who is "permanently" disbarred is not thereby forever precluded at some future date from seeking reinstatement. The Florida Bar v. Mattingly, 342 So. 2d 508 at 510(Fla. 1977). "To arbitrarily and immutably cut off the opportunity to seek reinstatement to the Bar, regardless of a subsequent demonstrated record of rehabilitation, good conduct, and clean living is too harsh and unremitting. It is out of keeping with the Biblical philosophy that no one is altogether beyond redemption. It is also contrary to modern concepts concerning rehabilitation of persons convicted of crime and state parole and pardon policies." Hipsh at 312.

The unique facts and circumstances in this matter mandate an equitable review by this court. The Ohio courts have forever barred petitioner from the practice of law in that State. That

decision was found to be "harsh" by this courts referee after hearing the evidence, which evidence included the testimony of the assistant prosecuting attorney who had the most knowledge of the particular facts in the underlying drug abuse case.

The Bar has spent a great deal of time and money investigating the petitioner. It had the opportunity to call as many witnesses as it wanted and was afforded the opportunity to cross examine each witness, most of who were professional people, at the evidentiary hearing. TR 102. The undisputed evidence shows that despite a lengthy investigation and the ability to call the witness who appeared against the petitioner in the Ohio case, The Bar only argues a single point which this court has often rejected, to immutably cut off the opportunity to seek reinstatement to the Bar and to deny this court any discretion in reinstatement proceedings such as in the case at bar. TR 6 Neither the evidence presented in this matter nor equity should allow that point to be the law of this State.

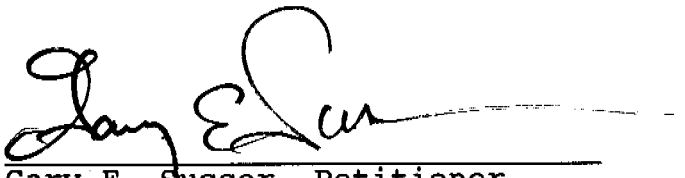
This court should view each discipline case solely on the merits presented. The Florida Bar v. Jahn, 509 So. 2d 285(Fla.1987). Because this case presents a number of unusual circumstances, the recommendations of the referee should be followed. See The Florida Bar v. Marcus, 616 So. 2d 975(Fla. 1993).

The Bar has not met its burden of proof as required by Rule 3-7.7(c)(5). As such, the recommendation of the referee must be followed as it is not erroneous, unlawful, or unjustified.

CONCLUSION

This Court is the final arbiter of the law of this state. It is endowed with powers granted to it by the State Constitution and has the power to dispense equity and fairness. The first suspension levied by this Court was a one year suspension for a felony drug abuse offense. The second suspension of two years was levied for felony convictions which were all reversed. To permanently and immutably ban petitioner from the practice of law upon these factors is not equitable under any circumstances. It is contrary to the evidence presented and against the recommendation of this court's own referee. Based upon the foregoing undisputed facts and legal argument, Petitioner respectfully requests that this Honorable Court approve the Recommendation of the Referee and grant his Petition for Reinstatement.

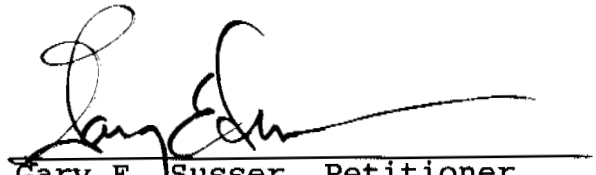
Respectfully Submitted,



Gary E. Susser, Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner's Brief regarding Supreme Court Case # 81,402 has been forwarded by certified mail P 050 742 227 return receipt requested to James N. Watson, Jr, Bar Counsel, at 650 Apalachee Parkway, Tallahassee, FL 32399-2300 on this 13th day of April, 1994.



Gary E. Susser, Petitioner
2755 S. Federal Hwy.
Suite #13
Boynton Beach, FL 33435-7743
407-735-4636